

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000902-MR

JAMES ELMORE TURNER

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT  
HONORABLE LARRY D. RAIKES, JUDGE  
ACTION NO. 01-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

ACREE, JUDGE: James Turner appeals from an order of the Hart Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. The trial court found that Turner's motion, filed more than three years after final judgment was entered against him, was untimely under RCr 11.42(10). We agree and, thus, affirm the trial court's decision.

Turner was originally charged by indictment with first-degree rape and complicity to commit first-degree rape against a victim who was less than fourteen years of age. The indictment was later amended to add a second count of each of the previous offenses, as well as charges of second-degree sodomy and complicity to commit second-degree sodomy. Turner's trial counsel obtained a plea bargain wherein he would plead to one count each of complicity to commit third-degree rape and complicity to commit third-degree sodomy. The Commonwealth agreed to recommend a five-year probated sentence. A final judgment convicting Turner of these offenses and sentencing him to serve ninety days, with the balance of his five-year sentence probated, was entered on May 6, 2003. Turner was also ordered to register as a convicted sex offender for a period of ten years.

On June 3, 2003, the trial court entered an order correcting the language in the judgment which required Turner to register as a convicted sex offender for a ten-year period and ordering him to register as a lifetime sex offender as required by Kentucky Revised Statute (KRS) 17.520(2)(a)(4). The distribution list for this order does not include Turner's name. However, it was tendered by his own trial counsel. Further, there is no dispute that Turner began signing sex offender registration forms which listed him as a lifetime registrant no later than September 17, 2003. Nevertheless, he did not file his RCr 11.42 motion until July 24, 2006.

In his motion, Turner argued that he received ineffective assistance when his trial counsel advised him that his belief that the victim was eighteen years of age and his assertion that no force was involved in the sexual encounter did not provide him with a legal defense to the offenses. In addition, he claims that his decision to plead guilty would not have been made had he been aware that he would be subjected to lifetime registration as a sex offender rather than the ten-year period contained in his judgment. The trial court denied the motion as untimely without an evidentiary hearing. This appeal followed.

In order to prevail on a claim of ineffective assistance, Turner must show that counsel made errors outside the professional norms for legal representation and, further, that he was prejudiced by those errors. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, since he entered a guilty plea, he must prove that, but for counsel's errors, there is a reasonable chance that he would have elected to go to trial instead of entering a guilty plea. *Hill v. Lockart*, 474 U.S. 52, 57, 103 S.Ct. 366, 88 L.Ed.2d 203 (1985). Turner argues that he was entitled to an evidentiary hearing because the claims contained in his motion could not be conclusively resolved by reference to the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). In particular, Turner complains that the trial court failed to address his claim that his trial counsel improperly advised him that he had no defense to the charges against him. However, RCr 11.42(10) requires that a motion for relief be filed within three

years of the time the judgment against a defendant becomes final unless he can prove either

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Turner makes no compelling argument that the existence, or lack thereof, of defenses to the charges against him was not something which he could reasonably ascertain within the time period provided for by the rule.

However, his second contention, that he would not have pleaded guilty knowing that such plea would subject him to lifetime registration as a sex offender and to a Class D penalty for failure to meet the registration requirements, deserves a closer look.

The trial court's order denying RCr 11.42 relief made the following finding:

[Turner] contends he was not aware of the life-time registration requirement until his present counsel was appointed. This argument is belied by the record which reflects [Turner's] signature on documents styled Sex/Criminal Offender Registry, Address Verification Form, dated September 17, 2003, December 5, 2003, March[,] 12, 2004, June 14, 2004, September 20, 2004, December 13, 2004, March 11, 2005, June 15, 2005, September 16, 2005, December 16, 2005, March 16, 2006, June 15, 2006, September 14, 2006, and December 20, 2006. The first sentence of each of these forms read [sic]:

According to KRS Chapter 17.510 and being classified as a “Lifetime” registrant, you are required to verify your address every 90 days. . .

Thus, even if [Turner] wasn’t aware of his Sex-Offender status at the time the final judgment was entered, he was certainly aware of the judgment by September 17, 2003[,] when he signed the first registration form reflecting his status as a life-time registrant, thereby preventing the applicability of the exception set forth under RCr 11.42 (10)(a).

Turner argues that his lack of awareness that he was subjected to lifetime registration until September 17, 2003, operated to toll the deadline for filing his RCr 11.42 motion until September 17, 2006. We disagree.

As the Commonwealth points out in its reply brief, the Kentucky Supreme Court has recognized the test found in *Dunlap v. United States*, 250 F.3d 1001 (6th Cir. 2001), for equitable tolling in *habeas corpus* actions as an appropriate measure for tolling under RCr 11.42(10)(a). The five factors of the test are as follows:

(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

*Robertson v. Commonwealth*, 177 S.W.3d 789, 792 (Ky. 2005). While the original judgment requiring Turner to register as a convicted sex offender did mistakenly list him as being required to register for a ten-year period, the judgment contained language on its face which clearly stated that lifetime registration was required for anyone convicted of two or more offenses against a minor. Further, even if he did

only become aware that he would be subjected to lifetime registration in September 2003, Turner chose to wait an additional two years and ten months before requesting RCr 11.42 relief. We find that does not satisfy the third prong of the *Robertson* test. Finally, as the Commonwealth points out in its brief, it has suffered prejudice from Turner's delay due to the trial court's order of September 4, 2003, permitting the destruction of all physical evidence in the case, including the contents of the rape kit. Consequently, the trial court correctly decided on the face of the record that Turner's RCr 11.42 motion was untimely.

For the foregoing reasons, the order of the Hart Circuit Court is affirmed.

ALL CONCUR.

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